Supreme Court No. 79884-2

Ninth Circuit Court of Appeals No. 05-35567

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE
NINTH CIRCUIT COURT OF APPEALS IN

J&J CELCOM, et al.,

Plaintiffs-Appellants,

v.

AT&T WIRELESS SERVICES, INC., et al.,

Defendants-Appellees.

REPLY IN SUPPORT OF MOTION BY AT&T WIRELESS SERVICES, INC. TO STRIKE NEW EVIDENCE AND ARGUMENT FROM REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION.

Plaintiffs do not address the numerous grounds cited by AWS for striking the proxy statement and the new constitutional argument, which were first referenced in their reply brief. The rules simply do not allow new evidence and arguments to be introduced belatedly on reply. The rules are not optional and plaintiffs should be held to them for the reasons previously stated and as further shown below.

II. THE PROXY STATEMENT AND ALL REFERENCES TO IT AND ASSERTIONS OF FACT BASED ON IT SHOULD BE STRICKEN.

Plaintiffs do not rebut AWS's showing that the proxy statement must be stricken for at least five separate and independent reasons: (1) it is outside the record; (2) it was submitted without permission of this Court; (3) it was not presented to the trial court; (4) it is beyond the scope of the Ninth Circuit's certification order; and (5) it is offered in support of an argument that plaintiffs are attempting to assert for the first time on reply. *See* Motion to Strike, at 3-5 and authorities cited therein.

Rather than address these issues (as they must), plaintiffs claim that they submitted the proxy statement with their reply brief to refute a purported new argument by AWS that there is no evidence it was attempting to sell the company when the subject transactions occurred. Appellants' Response at 5-6. That assertion is wrong, but even if it were

true it would be irrelevant; the rules and authorities barring such late evidence are unambiguous and do not permit plaintiffs to submit new evidence with their reply brief. Plaintiffs did not request leave to do so, as required by RAP 10.3(a)(8).

It is a gross distortion to state, as plaintiffs do, that AWS argued for the first time in its response brief that there is no evidence it was attempting to sell the company when the subject transactions occurred. The asset sale transactions and the later Cingular transaction are not "new" – they have been at the core of plaintiffs' case since they filed their complaint in August 2003. Plaintiffs had fifteen months in which to explore through discovery the circumstances surrounding those transactions. *J&J Celcom et al. v. AT&T Wireless Services, Inc., et al.*, 2007 WL 676007 *2 (9th Cir. 2007). Thus, plaintiffs are not addressing a "new" issue. Instead, they are trying improperly to influence the outcome of this proceeding by introducing new evidence that has been freely available to them for nearly four years.

Far from being a new argument by AWS, the fact that there is no evidence that the Cingular transaction was contemplated when the subject transactions occurred *is a point that plaintiffs conceded during oral argument before the Ninth Circuit.* In response to a question, plaintiffs' counsel "admitted . . . that there is no evidence that [the 2004 Cingular

transaction] was under consideration by AWS in 2002 and early 2003, when the buyouts were completed." *Id.* In fact, plaintiffs' own expert had admitted that the Cingular transaction should not be considered in determining whether the assets were fairly valued as of the transaction dates. He testified, "[Y]ou would not take into consideration . . . subsequent events, the AT&T [Cingular] transaction . . . [T]hat transaction would not be material because it's unforeseeable from that point in time." SER 0142-43.

It would be unfair to allow plaintiffs to submit the proxy statement with their reply brief. Because plaintiffs did not submit the statement in the trial court, AWS has not had an opportunity (or a reason) to submit declarations that would provide a context with which this Court could evaluate plaintiffs' characterization of the proxy statement. Those declarations would have explained that that characterization (Response, p. 6), is inaccurate. The document describes periodic discussions with third parties about *potential* business combinations. It states, "From the end of 2002 until the fall of 2003, our board periodically reviewed the state of the wireless industry and the issue of whether a business combination would be in our best interest . . . ." Proxy Statement (Response, Appendix A), at fifth paragraph. Nothing in the Proxy Statement suggests or shows that AWS intended to sell the company when the subject transactions occurred,

much less that it had negotiated deal terms with Cingular at that time that would have informed plaintiffs about the fairness of the price for which the partnership assets were sold.

In short, the Court should not permit plaintiffs to submit the proxy statement with their reply brief, with no meaningful opportunity for AWS to provide a proper context and response. Allowing such gamesmanship would make a mockery of this Court's rules and is directly contrary to the Ninth Circuit's certification order. For all these reasons, AWS respectfully requests that the proxy statement, and all references to it and characterizations of fact based on it, be stricken.

III. THE NEW CONSTITUTIONAL ARGUMENT SHOULD BE STRICKEN.

Plaintiffs' new argument based on the Contract Clause should also be stricken. Plaintiffs' citation to RAP 2.5 as authority for raising a new argument on reply is misplaced. That rule addresses review of trial court decisions and identifies very limited circumstances under which a new issue can be raised for the first time on appeal. This matter, however, is before the Court *on certification*. In that context, the Court has specifically recognized that "the court lacks jurisdiction to go beyond the question certified." *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676 (2000). The Court in *Broad* also noted: "Where an issue is not

within the certified questions, and is within the province of the federal court, this court will not reach the issue." *Id.* The Ninth Circuit carefully defined and certified a discrete legal issue that does not include the constitutional argument that plaintiffs now seek to raise. There is no reason – or legal basis – for this Court to go beyond that issue.

Moreover, even if this matter were not before the Court on certification, RAP 2.5 would not permit plaintiffs to raise a new constitutional argument for the first time on reply. RAP 2.5(a) identifies only one argument – lack of appellate court jurisdiction – that can be raised anytime, including on reply. Other arguments are subject to the settled rule that new arguments cannot be raised for the first time on reply. *See* Motion to Strike, at 4-5.[1] If the rule were otherwise, litigants could routinely save all constitutional arguments for their reply briefs (as plaintiffs attempt to do here), leaving the opponent no opportunity to address those issues.

Lacking authority for belatedly raising a constitutional issue, plaintiffs again seek relief from the rules by blaming AWS for purportedly raising a new argument and thus causing plaintiffs to make their new

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[1] AWS cited two cases in support of this argument: *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992), and *Markall v. Smithway Machinery Co.*, 34 Wn.2d 749, 757-58 (1949). Plaintiffs do not cite or discuss either case.

constitutional argument. Here, again, plaintiffs distort the facts. While they take pains to explain which authorities AWS did or did not cite on summary judgment, they ignore the fact that *their own summary judgment motion was all but devoid of references to Washington partnership law*, and they made only limited references to *Bassan* and *Karle* in their summary judgment reply brief. Instead, plaintiffs based their argument on the law of other states. Had they properly relied on Washington law (as the Ninth Circuit did, *see* 2006 WL 3825343 *2-3), the notion of a constitutional argument may have surfaced in federal court. It is far too late to raise the argument on certification, let alone for the first time on reply.

Moreover, plaintiffs had ample opportunity to assert their new constitutional argument before the Ninth Circuit. The parties' views as to the effect of *Karle v. Seder*, 35 Wn.2d 542 (1950), *Bassan v. Investment Exchange Corp.*, 83 Wn.2d 922 (1974), and the later-enacted RUPA provisions were fully aired not once but three times before the Ninth Circuit: (1) in the parties' briefs prior to oral argument; (2) at oral argument; and (3) in the parties' written comments on the proposed certified question. Because plaintiffs did not raise the constitutional issue before the Ninth Circuit, it is not included in the certified question and therefore should not be addressed.

Here too it would be unfair to permit plaintiffs to raise the constitutional issue for the first time on reply because AWS has not had a meaningful opportunity to respond to that argument. Contrary to plaintiffs' characterization (Response, p. 4), AWS has never argued (much less made a "new" argument that raises a constitutional issue) that RUPA somehow "trumps" *Bassan* or *Karle*. The opposite is true: AWS has plainly stated that the partnership principles articulated in those two cases are *consistent* with (not trumped by) later-enacted RUPA provisions. Appellees' Answering Brief, at 13.[2] Thus, passage of RUPA did not impair plaintiffs' rights under the partnership agreements. This brief discussion shows that there is no credible basis for a Contract Clause argument, but it is no substitute for complete substantive discussion in a response brief. For that reason too, plaintiffs' constitutional argument should be stricken.

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[2] Plaintiffs' assertion that AWS "has done a complete about-face" with respect to its application of *Karle* is likewise incorrect. In its brief to the Ninth Circuit, AWS cited *Karle* for the proposition that a partner can purchase assets of the partnership so long as the price is fair. *J&J Celcom v. AT&T Wireless Services, Inc.*, 2005 WL 4662905 (W.D Wash.) Appellees' Brief at 38-39. AWS also discussed *Bassan* and *Karle* at length in its response to the Ninth Circuit's request for briefing regarding the certified question, where it similarly explained the partnership principles set forth in *Bassan* and *Karle* and that RUPA is consistent with those principles.

IV. CONCLUSION

For all of the foregoing reasons, AWS respectfully requests that its motion to strike be granted. If the Court does not strike plaintiffs' new constitutional argument, AWS respectfully requests that it accept the surreply previously submitted, which briefly addresses plaintiffs' new argument.

DATED this 18th day of June, 2007.

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FILED AS ATTACHMENT TO E-MAIL

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on June 18, 2007, I caused to be served via messenger one copy of the foregoing Reply In Support Of Motion By AT&T Wireless, Inc. To Strike New Evidence And Argument From Reply Brief Of Appellants upon:

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I also certify that on June 18, 2007, I caused to be filed via electronic delivery the foregoing Reply In Support Of Motion To Strike New Evidence And Argument From Reply Brief Of Appellants with

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in accordance with the filing procedures described at:

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Malissa Tracey

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